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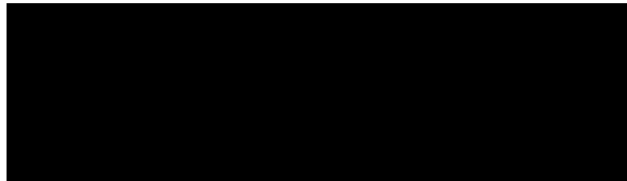
MEMORANDUM FOR THE RECORD

SUBJECT: Jackson/Nunn Amendment

1. This was a Senate floor amendment to the Fiscal 1974 Defense Appropriations Act. A modified amendment was adopted by the Senate/House conference committee and became section 812 of P. L. 93-155, which was enacted on November 16, 1973.

2. The amendment directed the President to seek payment from our NATO allies to offset fully any U. S. balance of payments deficit incurred as a result of the stationing of U. S. forces in Europe. If the deficit was not fully offset by 18 months (May 1975) after the bill became law, penalty provisions were to go into effect not later than 24 months (November 1975) after enactment. The penalty provision stated that no funds would be expended for any troops to be stationed in Europe above the average number of troops in Fiscal Year 1973, minus a percentage of 1973 troop figure equal to the percentage figure by which the balance of payment deficit was not offset.

3. Section 812 of the Act also had a general "sense of the Congress" type paragraph, (c), which stated that European countries should increase their financial contributions to NATO, so that U. S. contributions could be reduced. Paragraph (d) of the section required reports every three months to the Congress by the President on implementation of section 812.



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Assistant Legislative Counsel

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singer appeared before the Committee on Foreign Relations last week, he made clear that the administration accepts this provision of law and that the President intends to abide by it.

I ask unanimous consent to have printed at this point in the RECORD the questions I put to the next Secretary of State, together with his replies that relate to this amendment, taken from the official record of the committee's proceedings.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

#### QUESTIONS AND REPLIES

##### PRESENT PERIOD OF CONSTITUTIONAL CRISIS

Senator CHURCH. Dr. Kissinger, in the view of many people in the country today, we are living through a period of acute constitutional crisis that takes the form of excessive use of Executive power. There are any number of illustrations. For one, the impoundment by Presidential decision of congressionally appropriated funds for lawful programs, a practice that continues despite the fact that the courts, thus far, have declared it to be unlawful. The crisis is also exemplified by the last two wars which have been fought on Executive initiative and waged under the argument that there is an inherent power in the Presidency that permits him to engage in foreign wars without the specific consent of Congress. And, at present, it is reflected in the speculation in the press as to whether or not the President intends to comply with a Federal court order concerning the notorious White House tapes. If the position were to prevail that he need not comply with the court order on final appeal, I would think that 500 years of Anglo-American progress toward government under law would be seriously imperiled.

##### PUBLIC LAW 93-50

It is against that background that I would like to ask you two questions concerning two provisions of present law. One of those provisions, in its original form introduced by Senator Case of New Jersey and myself, is now Public Law 93-50, a part of the Supplemental Appropriations Act. It reads as follows:

None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam, and South Vietnam by U.S. forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.

From your initial statement, I take it that you view this provision of law as binding upon the President and that you would advise the President, as Secretary of State, to conform to it. Am I correct?

Mr. KISSINGER. That is correct, Senator.

Senator CHURCH. I have great personal respect for you. I welcome that answer for, had it been the opposite, I could not support your confirmation.

##### COOPER-CHURCH AMENDMENT

There is another provision of law that has been known as the Cooper-Church amendment reenacted several times over by the Congress. I would like to read it to you and then ask you a question or two relating to Cambodia today. It reads: "In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other act may be used to finance the introduction of U.S. personnel into Cambodia for the purpose of providing U.S. advisers to or for military,

paramilitary, police, or other security or intelligence forces in Cambodia."

The first question I would ask of you, Dr. Kissinger, is whether or not that provision of law is being complied with?

Mr. KISSINGER. To the best of my knowledge, it is.

TELEVISION NEWS SHOW, SHOWING U.S. COLONEL WITH CAMBODIAN FORCES

Senator CHURCH. About a month ago, I watched a national network television news program which showed an American colonel, as I recall his rank, in the field in Cambodia with Cambodian forces. The film showed him pointing in various directions on the battlefield, discussing what must have been matters of tactical concern, with Cambodian soldiers in uniform, and opening a map and discussing with reference to the map and the terrain, what he had to say. The Cambodians were listening very intently to what must have been his advice.

Assuming that this film was actually taken in Cambodia, as it was purported to be, and that the camera accurately recorded the event, would not that colonel be acting as a military adviser, contrary to the provisions of the law?

Mr. KISSINGER. Senator, I honestly do not know anything about that event, and it is very difficult for me to speculate. If the colonel was advising Cambodian troops in combat actions he was acting in violation of the law.

But let me make a general comment. The Vietnam war was conducted in an atmosphere of extraordinary bitterness within this country. I would say on both sides of the discussion, in which both sides believed that very grave issues of national policy were involved; under those conditions it is possible that things were done that seemed overwhelmingly in the national interest and that that was considered the primary criterion.

If what I have said to this committee is to have any meaning, then it would be totally inappropriate for me as Secretary, or as adviser to the President, to behave like a sharp lawyer and to try to split hairs and find some legal justification for something clearly against the intent of the law. So I think the better answer to give you, Senator, is to say, that when the law is clearly understood—and it will be my job to make sure that I clearly understand the intent of the Congress—we may disagree with it, but once the intent is clear we will implement not only the letter but the spirit. If such an event occurred as you describe, I will do my best to have it stopped.

Senator CHURCH. Dr. Kissinger, I want to thank you for that assurance and, knowing you as I do, I am certain that you will follow through with it.

Mr. KISSINGER. Thank you.

Mr. CASE. Mr. President, will the Senator yield?

Mr. CHURCH. I yield.

Mr. CASE. Mr. President, the distinguished senior Senator from Idaho and I are very pleased to join in submitting this amendment. It is in line with previous collaboration we have had on similar matters. As he has said, it is acceptable to the administration; it changes nothing in existing law.

I hope that the leadership on both sides find it possible to accept the amendment, and we can dispose of it without a record vote.

Mr. SYMINGTON. Mr. President, I will accept the amendment.

Mr. THURMOND. Mr. President, the Senate and the entire Congress have considered this amendment several times, I believe. In view of that

fact, I think it would be useless to oppose it. We will accept the amendment and take it to conference.

Mr. CHURCH. Mr. President, I yield back the remainder of my time.

Mr. THURMOND. I yield back the time on this side.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the amendment of the Senator from Idaho (Mr. CHURCH).

The amendment was agreed to.

Mr. CHURCH. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SYMINGTON. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

##### AMENDMENT NO. 514

Mr. PROXMIRE. Mr. President, I call up my amendment No. 514.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk proceeded to read the amendment.

Mr. PROXMIRE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the RECORD.

The amendment is as follows:

On page 30, between lines 2 and 3, insert a new section as follows:

"Sec. 703. (a) The second sentence of the first section of the Act entitled 'An Act to authorize the making, amendment, and modification of contracts to facilitate the national defense', approved August 28, 1958 (72 Stat. 972; 50 U.S.C. 1431), is amended by inserting '(1)' immediately after 'shall not be utilized', and by striking out the period at the end of such section and inserting in lieu thereof a comma and the following: 'or (2) to obligate the United States in any amount in excess of \$20,000,000, except with the prior approval of the Congress.'"

"(b) The second sentence of section 302 of the Defense Production Act of 1950 (50 App. U.S.C. 2092) is amended by inserting '(1)' immediately after 'except that' and by striking out the period at the end of such section and inserting in lieu thereof a comma and the following: 'and (2) no such loan may be made in an amount in excess of \$20,000,000, except with the prior approval of the Congress.'"

"(c) Section 2307 of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed \$20,000,000, except with the prior approval of the Congress."

"(d) Section 18(a) of the Military Selective Service Act (50 U.S.C. App. 468) is amended by inserting before the period at the end of the first sentence a comma and the following: 'except that no order which requires payments thereunder in excess of \$20,000,000 shall be placed with any person, except with the prior approval of the Congress.'"

"(e) Whenever any department or agency of the Federal Government requests or recommends approval by the Congress of any action requiring such approval under the first section of the Act entitled 'An Act to authorize the making, amendment, and modification of contracts to facilitate the na-

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tional defense', approved August 28, 1958 (72 Stat. 972; 50 U.S.C. 1431), under section 301 or 302 of the Defense Production Act of 1950 (50 App. U.S.C. 2092), under section 2307 of title 10, United States Code, or under section 18(a) of the Military Selective Service Act (50 U.S.C. App. 468), the Comptroller General of the United States is authorized to fully investigate the need for and the potential consequences of such approval by the Congress. In conducting any such investigation the Comptroller General shall have access to the complete financial records of any private business enterprise which is the proposed beneficiary of any such action requiring prior approval of Congress.

"(f) The amendments made by this section shall not affect the carrying out of any contract, loan, guarantee, commitment, or other obligation entered into prior to the date of enactment of this section."

On page 30, line 3, strike out "Sec. 703" and insert in lieu thereof "Sec. 704".

Mr. PROXMIRE. I modify the amendment so as to strike from page 3 beginning with line 3 and extending through line 20; and on line 21 the letter (f) should be changed to (d).

The PRESIDING OFFICER. The amendment is so modified.

The modified amendment is as follows:

On page 30, between lines 2 and 3, insert a new section as follows:

"Sec. 703. (a) The second sentence of the first section of the Act entitled 'An Act to authorize the making, amendment, and modification of contracts to facilitate the national defense', approved August 28, 1958 (72 Stat. 972; 50 U.S.C. 1431), is amended by inserting '(1)' immediately after 'shall not be utilized', and by striking out the period at the end of such section and inserting in lieu thereof a comma and the following: 'or (2) to obligate the United States in any amount in excess of \$20,000,000, except with the prior approval of the Congress.'"

"(b) The second sentence of section 302 of the Defense Production Act of 1950 (50 App. U.S.C. 2092) is amended by inserting '(1)' immediately after 'except that' and by striking out the period at the end of such section and inserting in lieu thereof a comma and the following: 'and (2) no such loan may be made in an amount in excess of \$20,000,000, except with the prior approval of the Congress.'"

"(c) Section 2307 of title 10, United States Code, is amended by adding at the end thereof a new subsection as follows:

"(d) Payments under subsection (a) in the case of any contract, other than partial progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed \$20,000,000, except with the prior approval of the Congress."

"(d) Section 18(a) of the Military Selective Service Act (50 U.S.C. App. 468) is amended by inserting before the period at the end of the first sentence a comma and the following: 'except that no order which requires payments thereunder in excess of \$20,000,000 shall be placed with any person, except with the prior approval of the Congress.'"

"(e) The amendments made by this section shall not affect the carrying out of any contract, loan, guarantee, commitment, or other obligation entered into prior to the date of enactment of this section."

On page 30, line 3, strike out "Sec. 703" and insert in lieu thereof "Sec. 704".

Mr. PROXMIRE. Mr. President, I have discussed the amendment with the manager of the bill (Mr. SYMINGTON) and with the distinguished Senator from South Carolina (Mr. THURMOND). It is

my understanding that with this modification they are willing to accept the amendment.

I will explain the amendment quite briefly.

Mr. President, first I ask unanimous consent that the distinguished Senator from Virginia (Mr. HARRY F. BYRD, JR.) be listed as a cosponsor of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PROXMIRE. Mr. President, the amendment would reassert congressional control over backdoor financing of defense contractors. In light of the Lockheed bailout, the C5A and Cheyenne problems, the purchase of stock in flour-drying companies, unusual loans to Grumman, and a host of other relatively unknown examples, it is clear that Congress has no real control over bailouts and back-door financing.

## BYRD-PROXMIRE AMENDMENT OF 1970

Once before we addressed this problem with regard to loans made under the Defense Production Act. A Byrd-Proxmire amendment subsequently was accepted by the Senate in a 75 to 0 vote and was passed by the House to become law on August 13, 1970. The Byrd-Proxmire amendment provided that any loan or guarantee made under the Defense Production Act section 2091 shall not exceed \$20 million without the approval of Congress. It was necessary due to the rather open ended language of that act and was designed to curtail unlimited loans to contractors.

## UNUSUAL ADVANCE PAYMENTS

That did not shut off the back-door financing, however. Instead of invoking section 2091, the Defense Department turned to title 10, United States Code, section 2307. Under this provision, emergency, advance and other payments can be made to a distressed contractor up to the total dollar amount of his contracts without any proof of work completed. In effect, they are loans whereby the contractor can keep his cash position solvent. This was the law used to provide Grumman with "loans" for the F-14 program.

## DEFENSE PRODUCTION ACT, SECTION 2092 APP.

There is another way to get around the congressionally imposed \$20 million level. The Defense Department can make use of the loan and loan guarantee authority in a companion section to 2091 of the Defense Production Act. Since the \$20 million level only applies to one section—2091—it leaves section 2092 open for exploitation. By its terms, section 2092 applies directly to the President and to those who are delegated his authority. It essentially contains the same powers as in section 2091. According to the General Counsel of the Department of Defense, section 2092 has not been used since it was enacted in 1950. Nonetheless, the authority is there ready to be invoked.

## VAST EXECUTIVE POWERS IN PUBLIC LAW 85-804

By far the most extensive powers given to the President and the Department of Defense reside in Public Law 85-804, title 50, section 1431, United States Code.

This law allows the President or any department he authorized to enter into contracts or modify contracts without regard to other laws if it would "facilitate the national defense." It also allows for advance payments.

The authority is delegated to the Secretaries of Defense, Army, Navy, and Air Force, and can be further delegated. Above \$50,000 in obligation, the action must be approved by a Deputy Assistant Secretary or by a departmental Contract Adjustment Board. The Department of Defense must report to Congress by March 15 of each year with an accounting of the actions under this law of the previous year.

A review of these annual reports indicates that Public Law 85-804 has been used to obligate \$700 million from 1959 to 1972. This is a staggering amount of money to be obligated by a back-door technique. It has been used to purchase stock as collateral in the GAP Instruments Corp., of Long Island. It has been used to provide financing for the ill-fated C5-A airplane and Cheyenne helicopter programs. It is the broadest and most flexible contract modification law on the books. The Department of Defense can virtually take any action it desires simply by stating that it would "facilitate the national defense."

## EVEN THE SELECTION SERVICE ACT HAS EMERGENCY PROVISIONS

Our review of existing emergency legislation also has uncovered a little known provision of the Selective Service Act, title 50, section 468, which remains in force since the national emergency of 1950. It does not appear that the extensive authority given the President under the Selective Service Act has been used, but it could be. In fact there have been strong hints that use of this act was under consideration as a technique to compel Grumman to produce F-14's.

The Selective Service Act permits the President, after receiving advice from the National Security Resources Board, to place orders for military goods and compel production by seizing the plant if necessary. In fact the President can take over a defense plant and run it as he sees fit simply by declaring it is in the interests of national security.

"Fair and just compensation" is required for any products furnished but there is no definition of what is fair and just.

## NEEDED CONGRESSIONAL APPROVAL FOR BACKDOOR FINANCING

My amendment would take the concept so readily accepted by Congress in 1970—the idea of a \$20 million limit without congressional approval—and apply it to these other laws that permit backdoor financing. In no way does it cut off emergency authority of the Department of Defense or the President. It simply requires that any action involving obligations of Federal resources over \$20 million must first be approved by Congress. If Congress says OK, then they go through. But Congress can also say "No" and that is the authority it does not now have. Each individual case would be debated on its merits. There would be less chance of backdoor bailouts.

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For those who would be concerned about the limitation of Presidential authority in an emergency, there are two sound points to consider. First, Congress can always give its approval as I am sure it would in an emergency.

Second, and even more important, the President has extensive emergency authority to meet any circumstances without the laws in question. Under title 10, the President has two sections—4501 and 9501—which give him vast authority to place orders for defense goods, transfer production, insure production, and seize facilities if necessary. The qualifying time phrase is "in time of war or when war is imminent." Similar provisions exist in title 50, United States Code, section 82.

It is obvious, therefore that loopholes must be plugged while still allowing broad leeway in time of national emergencies. My amendment would do just that.

## A SUMMARY OF RELEVANT LAWS

Mr. President, the following is a short summary of the current legislation that enables the Department of Defense to take such extraordinary actions without prior congressional approval:

First, 50 U.S.C. 1431: National defense contacts, authorization and official approval. Public Law 85-804:

This section empowers the President to authorize Government agencies to amend or modify contracts, and to make advance payments on contracts, when the President believes such action would facilitate the national defense. This section applies only during a national emergency.

As implemented by Executive Order 10789—1958—agencies may take the actions specifically enumerated in the section, as well as "modify or amend or settle claims" and "enter into agreements—modifying or releasing accrued obligations."

Other parts of the Executive order make the following provisions, among others:

Proper records must be kept and made available for public inspection unless disclosure would harm the national security.

A report to the Congress of all actions taken during the previous year under the section must be made by March 15.

Advance payments may be made only after obtaining adequate security.

The Comptroller General has access to "directly pertinent" corporate records, subject to certain limitations in section 1433.

A contract amendment may not increase the price to an amount higher than the lowest rejected bid of a responsible bidder.

Second, 50 United States Code App. 2092: Loans to private business enterprises. Defense Production Act:

This section allows the President to provide for direct loans to private business enterprises to expedite the national defense. Loans may be extended only to the extent that they are "not otherwise available on reasonable terms." Statutory to be extended. The previous section 2091, which provides for loan guarantees, was

amended in 1970 to include a \$20 million limit on guarantees unless approved by Congress.

Third, 10 U.S.C. 2307: Advance payments:

This section allows heads of agencies to make advance, partial, progress or other payments, not to exceed the unpaid contract price, only if the contractor provides adequate security.

Fourth, 50 United States Code App. 468: Utilization of industry. Selection Service Act:

This section authorizes the President to compel producers to fulfill defense contract obligations. Nonfulfillment includes failure to fill an order "within the period of time prescribed by the President" and failure to furnish articles at the contract price, among others. In the event of noncompliance, the President is authorized to take immediate possession of any facility and to operate it to produce the contract material. This section applies only during a national emergency.

Mr. President, I ask unanimous consent that my exchange of correspondence with the General Counsel of the Department of Defense be placed in the Record at this point, except for his lengthy appendices.

There being no objection, the correspondence was ordered to be printed in the Record, as follows:

CONGRESS OF THE UNITED STATES,  
Washington, D.C., February 15, 1973.  
Mr. J. FRED BUZHARDT,  
General Counsel, Department of Defense,  
Washington, D.C.

DEAR MR. BUZHARDT: I am undertaking a review of the emergency legislation now on the statute books which might be used by the President or the Department of Defense as authority for providing emergency relief to defense contractors in various kinds of financial difficulty.

I have read your testimony of January 15th on this subject before Senator Byrd's Armed Services Subcommittee on General Legislation, and I would much appreciate it if you would answer the following questions which that testimony brings to my mind.

(1) In your testimony you cited three statutory provisions which might be used by the Department as authority for emergency relief:

Title 50, Section 1431 U.S.C. (P.L. 85-804).  
Title 50, Section 2091 U.S.C. App. (Defense Production Act).

Title 10, Section 2307 U.S.C. (Advance and Other Payments).

Would you please provide me with a detailed record of the use made by the Department of these provisions during the past three years—the dates of each action taken, the names of the corporations or other beneficiaries involved, and the dollar extent of each obligation or commitment? (My interest in Title 10, Section 2307 U.S.C. is limited to advance payments and other payments of an emergency nature which may have been made, not to customary progress payments provided for in contracts when entered into). Would you also provide me with a separate record of those occasions on which these provisions have been used, at any time since they became effective, to provide a corporation or other beneficiary with relief in excess of \$20 million?

(2) You did not refer in your testimony to the use of Title 50, Section 2092 App. which authorizes the President

to loan (or guarantee loans) to private business enterprises under specified circumstances beneficial to the national defense. Would you please provide me with a detailed record of the use made of this provision during the past three years?

Would you also provide me with a separate record of those occasions when it has been used, at any time since it became effective, to provide a private business enterprise with aid in excess of \$20 million?

(3) You did not refer in your testimony either to Title 50, Section 468 App. U.S.C. or to Title 50, Section 1152 App. U.S.C., which provisions were referred to as the "Selected Service Act" and the "War Powers Act" by the Navy last year in testimony to the Tactical Air Power Subcommittee of the Senate Armed Services Committee. The Navy suggested in that testimony (at page 3812 of Volume 6 of the Committee's FY 1973 authorization hearings) that these provisions could be invoked to compel defense contractors on the F-14 to continue production of the planes. Is it your opinion, also, that either or both of these provisions would be legally applicable to compel continued production of the F-14 by those F-14 contractors unwilling to continue production without a restructured contract? If you believe that Title 50, Section 468 App. U.S.C. would be applicable, how would the "fair and just compensation" called for by subsection (d) of that section be determined (would it be the costs of continued production, the existing contract price, or something else instead)? If you believe that Title 50, Section 1152 App. U.S.C. would be applicable, how would the price to the government of continued production be determined under that section? Would you please provide me with a detailed record of the last five times each of these Sections has been used to compel production of a major weapon system program—the dates of each action, the names of the contractors involved, the dollar magnitude of the production work in question, and a precise explanation as to how the price of that work to the government was determined?

I would deeply appreciate it if you could provide me with answers to the above questions by March 5, 1973. Should you be reluctant, in light of present negotiations regarding the F-14, to answer how those questions which refer directly to that program, I would accept immediate answers to all other questions (including those regarding the historical use of Title 50, Sections 468 App. and 1152 App.) and a later reply to the F-14 related questions. Mr. Ron Tammen of my staff (Ext. 56653) would be happy to assist you in responding to this request.

Sincerely,

WILLIAM PROXMIER,  
Subcommittee on Priorities and Economy  
in Government.

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., March 7, 1973.

HON. WILLIAM PROXMIER,  
Chairman, Subcommittee on Priorities and  
Economy in Government, Joint Economic  
Committee, U.S. Senate, Wash-  
ington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your letter to February 15, 1973 in which you asked for certain information in connection with your review of legislation which provides for financial assistance to contractors.

Pursuant to section 4 of Public Law 85-804 (50 U.S.C. 1434), the Department of Defense annually provides a report to the Congress of actions taken under that authority. I am providing as Enclosure 1 a copy of each year's report with the exception of 1972 which is in the process of preparation. A copy of the 1972 report will be sent to you when it is

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transmitted to the Congress within the next few weeks.

Enclosure 2 represents information compiled by the military departments in response to your inquiry concerning actions taken under section 301 of the Defense Production Act (50 U.S.C. App. 2001) and 10 U.S.C. 2307.

Authority to take loan action under section 302 of the Defense Production Act (50 U.S.C. App. 2002) was delegated to the Secretary of Treasury and to Director of the Office of Emergency Preparedness by section 310 of Executive Order 10480, as amended. We understand that no loan action by those agencies has been taken under this authority for many years and we have been unable to find any record in the Department of Defense which would indicate the extent Defense contractors were ever involved in such loans since enactment of that provision in 1950. You may wish to make further inquiry of those agencies.

We find no record of the use by the Department of Defense of section 18 of the Selective Service Act (50 U.S.C. App. 468) since its enactment in 1968. In the light of present negotiations concerning the continuance of the production of the F-14, we would prefer not to give an opinion as to the provision's applicability to the situation at this time.

The provisions of 50 U.S.C. App. 1152 are no longer in effect. As indicated in 50 U.S.C. App. 645, the provisions of section 1152(a) were to remain in force until June 30, 1949, or until June 30, 1950 in the case of contracts or orders for tin and tin products. (The only extension beyond these dates was in connection with import controls on fats, oils, rice, and rice products, in which case the final expiration date was August 1, 1951. See note following 50 U.S.C. App. 1152.) Additionally, it should be noted that the national emergency declared on September 8, 1939 and referenced in section 1152(a)(1) was terminated on April 29, 1952 by Presidential Proclamation No. 2974. We have found no record which indicates the extent this authority was used prior to the expiration.

I trust the foregoing information will meet your needs.

Sincerely,

J. FRED BUZHARDT.

Mr. SYMINGTON. Mr. President, speaking for this side of the aisle, I am very glad to accept the amendment. I think it is a superb amendment. It is wise and constructive and it brings expenditures under more control of Congress as we previously thought they were in legislation we had passed heretofore.

I commend the Senator from Wisconsin and the Senator from Virginia for bringing this legislation before us. We are glad to be able to accept it.

Mr. THURMOND. Mr. President, we feel this amendment does have merit and we are willing to accept it and take it to conference.

Mr. PROXMIRE. Mr. President, I yield to the Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. HARRY F. BYRD, JR. Mr. President, I am glad to join with the distinguished and able Senator from Wisconsin in cosponsoring this amendment. It would prevent the Department of Defense from making loans in excess of \$20 million without the approval of Congress.

I introduced similar legislation on January 11 of this year, and following the

introduction of that legislation the Subcommittee on General Legislation of the Committee on Armed Services held a hearing on it. A major purpose of the hearing was to try to delineate how many sections of the code there are under which the Department of Defense can make loans to defense contractors.

Mr. President, I have before me a transcript of the hearing which occurred on Monday, January 15, 1973. In that hearing it was established that there are at least four sections of the code under which loans can be made by the Defense Department to these two defense contractors: One is 85-804, another is 2307, another is the Defense Production Act. Then, there is another section dealing with salvage operations. The matter of salvage operations presents a very slight problem and I do not think it is a matter of great concern. But there are four sections of the code under which the Department of Defense can act.

Mr. President, this matter first came to my attention in 1970 when the Penn Central Railroad was in difficulty. It was proposed and the administration was considering loaning to the Penn Central Railroad the sum of \$200 million and using as authority the Defense Production Act. I began to look into that act to find out what the ceiling was in the code for loans under the Defense Production Act. I found there was no ceiling. I introduced legislation along with the able Senator from Wisconsin to place a ceiling of \$20 million so far as the Defense Production Act is concerned.

The Department of Defense found these other sections of the code under which they could act. For example, in the Grumman case, the loan was \$54 million.

So I think something along the line of the Proxmire-Byrd amendment should be agreed to. I was willing to cooperate with the Department of Defense to work out something whereby legislation would not be necessary. After the hearing on January 15 held by the Subcommittee on General Legislation of the Committee on Armed Services it was agreed between the committee and the Department of Defense that the Department of Defense would work with the staff of the committee to work out an arrangement which would be agreeable to Congress and the Department of Defense so that legislation would not be necessary. But I have been informed by the committee, and in searching my files in my office I find that the Department of Defense has not complied with what I thought was a proposal that we had agreed upon.

I am glad to support the proposal of the able Senator from Wisconsin.

Mr. President, in that connection I ask unanimous consent to have printed in the Record the transcript of the hearings held before the Subcommittee on General Legislation of the Committee on Armed Services on Monday, January 15, 1973, because it deals in some detail with this question of loans.

There being no objection, the transcript was ordered to be printed in the Record, as follows:

DEPARTMENT OF DEFENSE COMMITMENTS TO DEFENSE CONTRACTORS; MONDAY, JANUARY 15, 1973

[Before the U.S. Senate Subcommittee on General Legislation of the Committee on Armed Services, Washington, D.C.]

The Subcommittee met, pursuant to call at 10:00 o'clock a.m. in Room 231, Russell Senate Office Building, Senator Harry F. Byrd, Jr., (Chairman of the Subcommittee) presiding.

Present: Senators Byrd (presiding), and Hughes.

Also present: John T. Ticer, Chief Clerk, George H. Foster, Jr., LaBre R. Garcia and John A. Goldsmith, Professional Staff Members.

Senator Byrd. The Subcommittee will come to order.

Today the Subcommittee on General Legislation will take testimony concerning the policies of the Department of Defense in making financial commitments to contractors.

I understand that we will hear from The Honorable J. Fred Buzhardt, General Counsel, Department of Defense.

This hearing has been prompted by loans totaling some \$54 million, made to the Grumman Corporation, an aircraft manufacturer.

In July of 1970, I introduced an amendment to the Defense Production Act that was intended to limit financial commitments to defense contractors to \$20,000,000.

At this point I will read into the record the text of that legislation:

"Except with the approval of the Congress, the maximum obligation of any guaranteeing agency under any loan, discount, advance or commitment in connection therewith entered into under this section, shall not exceed \$20 million."

The amendment was applied to a provision of the Act dealing with loan guarantees. This amendment was approved by the Senate on a vote of 75 to zero, and subsequently was passed by the House and in Conference and became law on August 13, 1970.

This amendment resulted from the fact that the loan provisions of the Defense Production Act were open-ended. It was my view that a limitation should be placed on loans to contractors. The Senate vote of 75 to zero on my amendment indicates that the Senate was of the same view.

It was my understanding that the Byrd amendment in 1970 would fix a limit in the area of large loans to contractors. But the Grumman loan indicates that this is not the case.

As I understand it, the Navy has provided some \$54 million to Grumman under the provisions of Section 2307 of Title 10 of the U.S. Code, entitled "advance payments." This arrangement requires Grumman to pay 6 percent interest on the outstanding balance of funds and allows the Navy to place some limitations on the activities of the contractors such as dividend limitations, salary increases and others.

I have introduced legislation—S. 328—which would limit these so-called "advance payments" to \$20 million per contract. Today's session will be, in effect, a hearing on S. 328 and the committee would be glad to hear the suggestions and recommendations of the Department of Defense.

It is the Subcommittee's intention to determine just how many various ways remain for the Department of Defense to provide commitments of money to contractors without the prior approval of Congress, or without any limitations on amount, regardless of any semantic interpretation of such terms as "loans" or "advances."

At this point the Committee will call on Mr. Buzhardt to make any comment that he

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## CONGRESSIONAL RECORD — SENATE

September 21, 1973

STATEMENT OF J. FRED BUZHARDT, GENERAL COUNSEL, DEPARTMENT OF DEFENSE; ACCOMPANIED BY: LAWRENCE E. CHERMAX, COUNSEL, OFFICE OF NAVY COMPTROLLER; COLONEL BRUCE BENEFIELD, CHAIRMAN, CONTRACT FINANCE COMMITTEE, DEPARTMENT OF DEFENSE; AND JAMES P. NASII, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. BUZHARDT. Thank you, Mr. Chairman.

First, let me respond to your opening statement and say that the loan agreement with the Grumman Aircraft Corporation, as you pointed out in your opening statement was not made under the provisions of the Defense Production Act, which was amended in July 1970, in respect to guaranteed loans.

That Act, as you pointed out correctly, was unlimited, open-ended insofar as guaranteed loans are concerned. The advance payments made to the contractor in the Grumman case were made under the provisions of Section 2307 of Title X of the United States Code. This, however, is not an open-ended authority to make loans to contractors. Inherently the limitation is the amount of the contract which has been negotiated with the contractor, and beyond that amount there is no authority to make a loan to a contractor in 10 U.S.C. 2307. Accordingly, that limitation does stand with reference to advance payments, and cannot be exceeded by the Department.

So, in effect, Congress—

Senator BYRD. If I might interrupt you at that point, in this particular contract that would provide, what is the maximum that you could go into this contract in advance payments?

Mr. BUZHARDT. Well, it would be all the contracts with the particular contractor, Senator, not just the one contract but on any given contract, we can go to the amount that the Congress has authorized and appropriated for that contract. We can go further.

Senator BYRD. It would be a very substantial amount if you went to the maximum.

Mr. BUZHARDT. Yes, sir, it would be a substantial amount. In practice, however, this type of loan is usually, and in this case it is true, limited to the amount of work in progress, the value of the amount of work in progress on the particular contracts to which the loan is related, and it is within the annual appropriation amounts that the Congress has provided on the particular contracts which are involved. So that we have nothing beyond the specific amounts which the Congress has acted on as annual appropriations. So that it is not really open-ended at all. There is a very precise limitation. What is involved here is the method by which you make the funds available to the contractor.

Normally, progress payments are paid to a contractor during the performance of the contract. In this particular case the progress payments are based on 80 percent of the obligations incurred by the contractor and the loans are actually made on the 20 percent retainage which the contract provides for. Instead of just increasing the rate of progress payments the Department, in taking a more conservative view to financing the contractors, has seen fit to make these advance payments as loans so the company will have to pay interest and so that the special conditions can be attached to the agreement to advance this money in order to protect the taxpayers' investment about it such as the limitations on disposal of property, the prohibition against payment of dividends while the loan is outstanding, and the prohibition against increase of salaries, mortgaging the property and that kind of thing. The statute provides that as security for the loan the government will have first lien on work in performance and inventory as well as on the advance payments in the fund created by the advance payments. So we really don't have at all an

open-ended authority to loan under the provisions of 10 U.S.C. 2307.

Now, I should mention, of course, we have not used it in this case, there is another provision of law, we are talking about any provisions that we had, which is Public Law 85-804 which gives authority under certain prescribed conditions for the Department to amend the contract without consideration. This is a very unusual procedure but in that event funds could be advanced beyond that limitation.

Senator BYRD. Is it your interpretation that if two or three million dollars, to take some figure, were appropriated for a contract then the Department could advance this entire amount to the contractor?

Mr. BUZHARDT. It would depend on the performance of the work, Mr. Chairman, as to whether we could and that certainly would depend on the performance as to whether we would. I believe legally we could absent any special constraints, advance that fund for financing.

Now, as a matter of practice, these funds are only advanced under very exceptional circumstances and only advanced with a relationship being established on the work in progress, and the amount of work that is completed on the contract as time progresses.

Senator BYRD. You say the funds are only advanced in unusual circumstances.

Mr. BUZHARDT. That is correct, Mr. Chairman.

Senator BYRD. So what you are doing in regard to this particular advance is an unusual—is unusual, is that correct?

Mr. BUZHARDT. It is an unusual circumstance, yes, Mr. Chairman.

Senator BYRD. Well, how many other instances do you have where you have made, where you now have loans or advances outstanding?

Mr. BUZHARDT. Let me see, Mr. Chairman, I believe I have a list of them, Mr. Chairman, there are a number of them, advance payments, I have not actually counted them here that we have made that are outstanding since 1972. I might mention that there are really three categories here. In some cases the advance payments are used in the larger amounts to foreign governments where we are, where they are producing under a contract with our government. We advance the money in those cases so that they may proceed with the financing. The foreign government does not bear the burden of financing.

Senator BYRD. You are speaking now of foreign governments?

Mr. BUZHARDT. Yes.

We also have, the primary case in which it is used in with some non-profit contractor, universities—

Senator BYRD. Let's get down to cases which would be similar in nature to the Grumman case. That is a private profit-making corporation.

Mr. BUZHARDT. Let me say first there are roughly 60 altogether that are outstanding, and if you will give me just a moment I will count them to see how many cases we have outstanding, commercial companies. There are about eight, I believe, outstanding, Mr. Chairman. I will be glad to check that figure and count more precisely but I believe there are eight cases in which they are outstanding.

Senator BYRD. How many of those eight exceed \$20 million?

Mr. BUZHARDT. Only one, Mr. Chairman.

Senator BYRD. Only the Grumman one?

Mr. BUZHARDT. Yes, sir.

Senator BYRD. So with the exception of Grumman, the Department has stayed within the \$20 million limitation within the legislation set forth of 1970.

Mr. BUZHARDT. We have stayed within that limitation altogether, Mr. Chairman, if we don't believe there has been a use by the Department of Defense of the Defense Pro-

duction Act provisions since it was extended in 1970. In the case of advance payments, Grumman is the only case in which the loan is as much as or exceeds \$20 million that is outstanding at the present time.

Senator BYRD. You say the Grumman case is the only—

Mr. BUZHARDT. Only commercial.

Senator BYRD. The only commercial loan that exceeds that?

Mr. BUZHARDT. Yes, sir.

Senator BYRD. You have other loans that exceed that but not the commercial loan?

Mr. BUZHARDT. I believe that is the case, yes, sir. And those loans that exceed that I believe are to foreign governments. Advance payments we are speaking of here rather than—

Senator BYRD. Advance payments to foreign governments.

Mr. BUZHARDT. Yes, sir.

Senator BYRD. What governments would be involved in that?

Mr. BUZHARDT. The United Kingdom, I believe, is the largest example, Mr. Chairman.

Senator BYRD. And what type of contract do you have with the United Kingdom that would require—

Mr. BUZHARDT. These are primary co-production agreements, the Harrier aircraft and some engines that are involved for aircraft that we procure.

Incidentally, I might mention, Mr. Chairman, where we produce or we agree to sell to foreign governments defense materials that they reciprocate where we buy for their account they advance the funds with which we buy. In other words, it is not a one-way street.

Senator BYRD. To get back to the commercial loans, this is the only commercial loan that exceeds \$20 million?

Mr. BUZHARDT. That is correct.

Senator BYRD. No, in your remarks you pointed out that the funds involved in the F-14 procurement are appropriated funds. What the subcommittee is interested in primarily is the question of the proper use of appropriated funds. The questions arise in this connection such as what assurance do we have that the taxpayers' money has been properly safeguarded. What does the F-14 procurement arrangement tell us about the fiscal policies of the Department of Defense?

Mr. BUZHARDT. Mr. Chairman, of course we have—while I don't want to get into the details because of the status of the situation, let me assure you that the taxpayers' money, the taxpayers' interest, is most protected by using this approach. There could have been an alternate approach, of course, to increase the percentage of progress payments that are paid, which is done from time to time and in such case you would just advance 80 percent, advance some higher percentage.

In order to better protect the taxpayers' interest the rate of progress payments was not increased but rather the money was advanced as an advance payment or loan so the contractor would have to pay interest. It is limited by the contract amount, and quite well secured by work in progress on all of the contracts with which it relates. It would not, for instance, relate to the option for lot 5 under the Grumman contract, which has not been accepted by the company but only to the first four lots which are firmly under contract at this point. It does not relate to work on an option that has not yet been settled and accepted. So that the taxpayers' interest is best protected by this, and in addition you have the limitations that are placed on the company which are also designed precisely for this, so that the resources for the company cannot be squandered and the collateral is available to insure that the government does not lose

Senator BYRD. The primary purpose of this hearing to explore the details



the Navy really as collateral for the funds advanced under P.L. 85-804.

Senator BYRD. I am not arguing the merits of what the Navy did. I assume that the Navy felt that it had good and just reason for what it did. The point I am suggesting is that should the Defense Department have the authority to buy stock in corporations without coming to the Congress for approval.

Mr. BUZHARDT. Mr. Chairman, what was really done here was to take this stock as collateral and the Congress had given authority to advance the money without collateral. So, the Navy actually took the stock as collateral and I think the question of the stock ownership in this case is not really the issue if you could advance the money anyhow. I would certainly think the Congress would approve of the Congress taking whatever collateral was possible in such a case in order to best protect it.

Senator BYRD. What is to prevent a similar situation from arising with the Grumman Corporation or any other company, for that matter?

Mr. BUZHARDT. There is nothing to prevent it if P.L. 85-804 authority was used, Mr. Chairman.

Senator BYRD. Do you think that the Congress should not put some limitation on that, should not, if you are going to buy stock under 85-804 you have the authority you say to buy stock in most an company under defense contracts.

Mr. BUZHARDT. We have the authority under those circumstances, Mr. Chairman, to really take whatever collateral we can get to protect the government's interest and that really is what the taking the stock was all about.

Senator BYRD. But you are actually buying—you actually bought stock in this company. What I am speaking of now, what I am trying to get to now, is a matter of policy. Should you not come back, should not the Defense Department come to the Congress, if you are going out to buy stock in a company like that?

Mr. BUZHARDT. I really don't see much reason for it, Mr. Chairman, that the Congress will be concerned about the type of collateral the Department took. I presume, you know there may not have been any problem if we had taken a first mortgage on their corporate headquarters. It just so happens that wouldn't have really protected the government's interest, so I think it is a very different thing from going on the market and buying stock as such. This was a collateral type stock. It was not exercise of management.

Senator BYRD. Well, the GAP situation, as I understand it, started as advance payments, and then it proceeded to the stock issue as a next step.

Mr. BUZHARDT. I don't believe it started as advance payments, Mr. Chairman. This was an exercise of P.L. 85-804.

Senator BYRD. Well, let's take it—

Mr. BUZHARDT. There was a grant made under P.L. 84-804, there was a condition for repayment, the stock was taken as collateral.

Senator BYRD. And you have testified that under P.L. 85-804 that there is nothing to prevent the Defense Department from taking stock in any other corporation.

Mr. BUZHARDT. No, sir, there is nothing to prevent it. Taking it as security. It does not give us authority to go out and buy stock on the market, but to take it as security when funds are advanced under Public Law 85-804.

Senator BYRD. So now we have established, as I visualize it then, we have established today that there are three places in the law.

Mr. BUZHARDT. And possibly a fourth, a separate statute, I believe on salvage operations. There are some minor ones, I believe, Mr. Chairman. They don't really touch these of—much. Approved For Release 2000/08/27 : CIA-RDP75B00380R000600160006-7

lications, this sort of thing in advance of actually receiving the services, normal business statute just so we include everything, that kind of thing exists.

Senator BYRD. Yes.

I know these contracts are very complex and they are multitudinous and so forth, but what I am trying to get to establish in one place in the record is how many sections of the Code can the Defense Department utilize tax monies for in the way of loans, advances and et cetera. As I understand it we have the Defense Production Act as one, we have 2307 as one, we have 85-804 as one, and we have one which is in regard to salvage operations.

Mr. BUZHARDT. Yes.

Senator BYRD. Now the others—

Mr. BUZHARDT. Those are the major ones.

Senator BYRD. They are the major ones.

Mr. BUZHARDT. That is correct.

Senator BYRD. So if the Congress wants to tackle this problem these are the four areas that need to be appraised and considered.

Mr. BUZHARDT. That is correct, yes, sir.

Senator BYRD. Now, to get back to the Grumman case, I understand that Grumman has paid about \$8 million in Christmas bonuses to its employees, is that correct?

Mr. BUZHARDT. That is my understanding, Mr. Chairman, yes, and I might say that these were submitted and approved by the Navy. I would like to explain the circumstances on that.

Senator BYRD. Was this paid out of the cash available under these advances?

Mr. BUZHARDT. In part it could have been, Mr. Chairman, yes.

Senator BYRD. Well, if not, where did the contractor get the cash to pay the bonuses?

Mr. BUZHARDT. Well, he has progress payments coming in, which are much larger than the advance payments on a number of contracts that he is performing with us.

If I might here offer a little explanation on this: as you know, in connection with the advance payments restrictions were put on any salary increases throughout Grumman. The Navy has to approve them, and they are forbidden to pay any increases in salary. It has traditionally been the Grumman approach that their salaries are supplemented throughout the company by a bonus at the end of the year. It is sort of a method of paying of compensation without which quite frankly the salaries paid by Grumman would not be comparable at all with the rest of the aerospace industry so it is not an innovation. They have used this form of compensation over the years. Having established a firm history, I would think that would be within both the wage board's rules and within the constraints imposed by the Navy.

Senator BYRD. Were there other bonuses paid to Grumman employees out of the advance payments?

Mr. BUZHARDT. I believe there are two bonuses they are paid a year, Mr. Chairman, both of which, some of the funds could have come out of the advance payments. There is a production bonus that is paid at one point during the year, and there is one called a Christmas bonus that they pay, both of which are a standard method of compensation by Grumman to its employees.

Senator BYRD. Did Grumman specifically request the Navy to approve Christmas bonuses to its employees and if so, when was this done?

Mr. BUZHARDT. I think there was, the Navy was aware that the bonuses were being paid. I think there was no formal request for or approval because they did fit within the terms of the normal compensation without increases, but the Navy was fully aware that this method of payment of employees was used and had traditionally been used.

Senator BYRD. Was the Secretary of Defense consulted on this matter?

Mr. BUZHARDT. No, sir; not to my knowledge. I am sure that somebody in the office of the Secretary of Defense knew about it, certainly in the Assistant Secretary for Installations and Logistics, I am sure they were aware of it, they follow these things very closely.

Senator BYRD. Well, under the regulations doesn't the Navy have to specifically approve all use of advance payments?

Mr. BUZHARDT. All disbursements from the advance payments, special fund, yes, sir.

Senator BYRD. Yes.

Mr. BUZHARDT. What they do is counter-sign all checks, that is really what it amounts to from this fund, but some of them are for operating expenses of the prime contractor, and it would—well, they are all operating expenses and this would be a normal part of operating expenses.

Senator BYRD. And this, of course, we are speaking also of the bonuses for executives?

Mr. BUZHARDT. I think there were no bonuses for executives, Mr. Chairman. It was just the workers in the company. There is a limitation, I believe, on the actual salary amount that executives can make under the advance payments and any increases have to be approved by the Navy. There were no increases approved.

Senator BYRD. No increases have been approved?

Mr. BUZHARDT. No, sir, not for the executives at all.

Senator BYRD. Is it correct that Grumman sought private financing prior to this advance payment being made?

Mr. BUZHARDT. That is my understanding, Mr. Chairman.

Senator BYRD. And Grumman was unable to obtain that private financing?

Mr. BUZHARDT. Yes, Mr. Chairman.

Senator BYRD. And as a result of that the Navy provided the funds.

Mr. BUZHARDT. That is correct.

Senator BYRD. What was the contractors normal method of acquiring working cash before this advance was made?

Mr. BUZHARDT. Borrowed the money from the banks, Mr. Chairman.

Senator BYRD. Well, now, they are in a position where they cannot borrow any more money from the banks?

Mr. BUZHARDT. That is correct is my understanding, Mr. Chairman.

Senator BYRD. Did the contractor exhaust all sources of cash available before these advances were made?

Mr. BUZHARDT. Yes, Mr. Chairman.

Senator BYRD. Did they consider sale of assets and other available resources?

Mr. BUZHARDT. It considered its total financial capability, yes, Mr. Chairman. He had to make his case to the Navy before advance payments were considered.

Senator BYRD. There is no certainty that greater amounts than the \$54 million advance will be required, I take it?

Mr. BUZHARDT. I really couldn't speak to the amount that will be required, or would be required in the future, Mr. Chairman. I would not rule it out and I would not say with assurance that it would be as a necessity for protecting the government's interest in the working products. I am informed that the probability is that it will go up but it will also go down. [Laughter.]

This will fluctuate, Mr. Chairman, that is what I am really saying.

Senator BYRD. All right. It now stands at \$54 million.

Mr. BUZHARDT. That is correct.

Senator BYRD. Is it the judgment of the Department that before it goes down that it will go substantially higher than \$54 million.

Mr. BUZHARDT. We recognize that as a possibility, Mr. Chairman. Not very much probability. Approved For Release 2000/08/27 : CIA-RDP75B00380R000600160006-7

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Senator BYRD. What protection does the Navy have under those conditions if the contractor refused to continue the program or if it goes into bankruptcy?

Mr. BUZHARDT. Mr. Chairman, the advance payments are not related to the production lot which is currently in dispute. When I spoke of the work in progress I am speaking of the work in progress that is actually now being performed under contract by Grumman.

Senator BYRD. But tax funds are being used for long lead time items of these, of a subsequent lot.

Mr. BUZHARDT. That is not, that has no relationship really to the advance payments we are talking about before making it. That is correct.

Senator BYRD. I am aware of that. But it is still tax funds.

Mr. BUZHARDT. That is correct. The long lead time items, some funds have been expended for these. If the contractor does not perform then I am afraid I shouldn't comment on the options available to the Department of Defense. I might say that one of them would be to accept the items so produced for the inventory in connection with the aircraft that are produced, but I don't think I should go beyond that. There are other options available to the government.

Senator BYRD. Let me ask you this: Is the price for the FY 1972 procurement, called lot 4, defunct and agreed to by the Navy and Grumman or is it still being negotiated, lot 4?

Mr. BUZHARDT. Lot 4, I believe is a contract, yes, sir. The option was exercised and accepted for the, for lot 4.

Senator BYRD. But the price is firm, it is not being negotiated?

Mr. BUZHARDT. That is basically correct, yes, sir. The Congress, as you will recall, put limitations on the funds in the committee report and in the language, both of which were met by the Department in exercising this option, and I might say there may be some facets of this, minor facets that may still be under negotiation, change orders, and this sort of thing.

Senator BYRD. Since the contractor has reported losses on this F-14 program, how is the Navy and the Defense Department assured that this advance is not being used to fund Grumman's share of the loss?

Mr. BUZHARDT. As I pointed out, Mr. Chairman, as you know there is a disclosure by the contractor of his financial records, and in addition to which this disclosure requirement is also attached to the agreement for advance payments, so that we have a pretty good sight as to where these funds go. In addition to which the fund created by the advance payment is very tightly controlled. As I mentioned all checks are countersigned by the Navy. They are so accounted for to exclude the loss.

Senator BYRD. Would this next statement be correct: If under the conditions of 2307 the contractor can receive advances up to the unpaid contract price then the contractor could, in effect, receive his profit before he has earned it.

Would that be a correct statement?

Mr. BUZHARDT. Well, in the particular case, Mr. Chairman there is no profit.

Senator BYRD. Yes, I am speaking now though of a matter of policy because what we are concerned primarily with is policy.

Mr. BUZHARDT. I believe it would be hard to arrive at a conclusion that the contractor by any means received his profit before he did his earnings.

Senator BYRD. But if he can receive advances up to the unpaid contract price would he not be receiving his profit before it was earned?

Mr. BUZHARDT. Yes, sir, before it was earned.

Senator BYRD. Before it was earned.

Mr. BUZHARDT. Yes, but in practice it just does not work that way. It may be theoretically possible. It would be unlikely that any contractor would be willing to pay interest on his profit as to before it is earned.

Senator BYRD. Well, the contractor unless he has a very large cash flow he has to pay interest to somebody, he has to borrow money unless he has very large working capital.

Mr. BUZHARDT. That is true. But it would not result in his profit, operating capital, yes.

Senator BYRD. Operating capital so he has to pay interest to somebody.

Mr. BUZHARDT. And it would be a very unusual case, I think. It is possible but it would be very unusual that advance payments are used in a case where a contractor has much profit involved in the contract.

Senator BYRD. If these advances, and I am not speaking now of Grumman as I mentioned, but speaking broadly, if these advances are paid to the contractor before the work is completed and for any reason the work is rejected or the contract price is later reduced because of reduced work, then how does the Navy get its over-advances back? Suppose the contract is rejected?

Mr. BUZHARDT. If the item is rejected, well, as you know, Mr. Chairman, the items are not all completed and then accepted by the services, they are inspected as the books are audited and as the work progresses. Actually your progress payments fall in the same category, the same protection is used in the advance payments as used in the progress payments. You pay him as he progresses with the work, and in some cases, for instance, where you have in the same situation that you are, these are not without risk it is conceivable that a major contract would be defaulted and a return of all the progress payments made demanded of the contractor. Whether or not under such circumstances you would be able to collect would depend on the financial stability of the company. There is obviously always in any contract, where a contractor defaults, a question of whether the other contracting party could be completely made whole.

Senator BYRD. The purposes of section 237, I must say, it was enacted as best I can determine March 1, 1947, a long time ago, but in reading a part of the legislative history of that legislation, I find this: "The need for this authority also exists in peacetime in the case of research and development contracts many of which are with educational and research institutions or small business concerns," that was the purpose of the Defense Production Act, "which are unable to finance research projects."

Now, I admit frankly that is not necessarily the full legislative history, but the best I can determine it gives the flavor of the legislative history of this, and if that is the case, it seems to me that the Department has gone well beyond the intent of Congress in using 2307 for the purpose that it has used it for.

Mr. BUZHARDT. Mr. Chairman, I don't agree with that at all. As I say the statute has been around for many years now. The Congress is fully informed on the use of the advance payments authority in every case. They are informed, the committees are informed, and we have never had any objection raised by the Congress and I know of no case where the use of advance payments has resulted in a detriment to the taxpayers' interest.

Senator BYRD. Well, that is not the point I am suggesting. What I am suggesting is that the legislative history of this Act indicates that it was primarily for research and development contracts with educational and research institutions.

Mr. BUZHARDT. Might I say in the large number of cases it is used, I agree the legislative history in any way con-

finer it to that, Mr. Chairman, and this is really the total procurement approach here, and it has been used with the Congress' full knowledge and understanding over these 20-odd years, and I am sure had it been inconsistent with the legislative intent, the Congress would have come back on us long before now.

Senator BYRD. Well, I am not so sure of that because, let's take that Defense Production Act of 1950, which goes back almost as far as this does, I can't say categorically, of course, but my guess is that virtually no member of the Congress, and Congress at the present time was aware there was no limitation on it and as soon as they found there was no limitation on it the Congress acted and that is the main purpose of these hearings today is to see whether we need legislation in sections other than the Defense Production Act.

Mr. BUZHARDT. As I did point out, Mr. Chairman, this is—this section 2307 does not give us unlimited authority. It is limited to the contract amount and on each of these programs the Congress have used them annually, they authorize them in annual increments, not for the full span of the contract, and then it goes through the appropriation procedure and provides not in excess of the annual appropriation so there is a limitation.

Senator BYRD. The Department and the Congress are partners, we are not adversaries, we are partners, we have to work together for the public good, and I am concerned as to whether the Congress may have enacted legislation that is too broad, legislation that gives too much authority to the Department in the handling of tax funds. We are not dealing with our own monies, of course, we are dealing with the monies of all the hard working wage earners of our nation and every one who pays taxes, and I am wondering if we couldn't—I think we have certainly cleared up the Defense Production Act, at least it has been limited to my satisfaction and I think the satisfaction to most members of the Congress.

Now, if you read the debates of that in 1970, there were many members of the Senate who objected to the \$20 million limitation and wanted to make it a lesser amount.

Mr. BUZHARDT. That is right.

Senator BYRD. Wanted to make it a lesser amount but I think that is a reasonable figure. I think the Department has got to have some leeway in the handling of these complex matters, and it seemed to me that that was a reasonable figure.

Now, we come—so that part of the code is taken care of, at least it is taken care of to my satisfaction and I think to the satisfaction of the Congress—now we come to the three other sections, the salvage operation, I don't think we can get into today and I think that impresses me as being a specialized matter and a matter not of great moment but we have two other sections, one is 2307 and the other is 85-804, and it occurs to me that we do need to make, reach some agreement or have some legislation which would put greater restriction on the use of tax funds in regard to those two sections, than we have at the present time, and in that connection, I introduced legislation on this past Friday, I guess it was, or Thursday, January 11, to limit to \$20 million the total amount that may be paid in advance on any contract entered into by the Army, Navy, Air Force, Coast Guard and NASA, following the same, I used the \$20 million figure as the same amount that we put in the Defense Production Act. I said in my remarks in the Senate that I wanted to be reasonable. If that figure was not a reasonable figure we could discuss it, and the Defense Department could present its views, and I would be inclined to take any reasonable figure. I think the \$20 million figure is a reasonable figure because by your own testi-

mony, insofar as commercial transactions are concerned, as distinguished from governmental transactions or educational transactions, there is only one loan not outstanding that exceeds \$20 million and that is the case that we have been talking about today.

Mr. BUZHARDT. Mr. Chairman, I agree that the problem here is one of technique of getting at the problem, I think, as you have narrowed it. We do have a problem with the legislative approach because it is hard in statutory language to distinguish as to the precise methodology used to advance payments to foreign governments and to advance payments to commercial enterprises in addition to which I am afraid your legislation might apply, as drafted both to, advance payments, to progress payments and even final payments under a contract, all of which are covered under 2307.

I might suggest one approach to use in this situation, as you know, where funds are used by the Department for purposes other than that which is justified before the committee, in excess of a certain amount, we treat those as a prior approval reprogramming and they are submitted to the Congress, to the committees.

That, I think, might offer a potential in the way of procedure that the Congress might want to look at as a way to deal with this. As you say, this is the only case we have outstanding where the \$20 million amount is concerned, and I would see no problem at all, perhaps through an exchange of correspondence with the committee in agreeing to treat in any future case an advance payment that was in excess of \$20 million as we treat a prior approval reprogramming, so that we advise the committee and wait to see if the committee has any reaction to that or if the committee will approve it.

Senator BYRD. The Committee has to approve it.

Mr. BUZHARDT. The Committee actually has to approve it. You have both kinds but we will treat that as a prior approval and so that the committee would have to approve it before we went forward with the advance payments. I think also it might be a much more practical approach because of the time constraints that are often involved in advance payments. These things arise, they are designed really to deal with an emergency type situation, and I think if we had to wait for the express statutory action by the Congress we would have some real practical difficulties but I would see no problem with approaching it—

Senator BYRD. I think the reprogramming approach has very definite possibilities for tightening up of the procedure. The present—you mentioned in your comment a moment ago that the Congress is informed of any reprogramming desired and in the absence of objection it is—it should go ahead with it.

Mr. BUZHARDT. In some cases in the absence of objections and in other cases we wait for the committee's approval, that is called the prior approval type program.

Senator BYRD. I was under the impression that all reprogramming required the approval?

Mr. BUZHARDT. There are statutory limits, or there are limits within which the committees or which the Congress permits us to have reprogramming without having the prior approval of the committee only if we go above those limits.

Senator BYRD. Is that on amounts, based on limitations of amounts?

Mr. BUZHARDT. Yes, sir, you are right. Based on amounts, and in some cases specific items we have latitude in amount in certain types of transactions. In others in the type of, in the different types of, transactions there is not a limit on amounts.

Senator BYRD. I am not sure that the Senate Armed Services Committee, and I was

under the impression that all reprogramming came before that committee. I may be in error about it.

Mr. BUZHARDT. The committee does by statute provide us with certain transfer authority, Mr. Chairman. All of them, whether even if they don't require prior approval under committee arrangements, we do report nevertheless, we report all of them, and if they go over beyond the established limits we come for prior approval.

Senator BYRD. Established dollar limits.

Mr. BUZHARDT. Yes, sir.

Senator BYRD. I think certainly in the case of 2307 and 85-804 that whatever arrangements are made, whether it be by statute or by agreement should require prior approval over 20—

Mr. BUZHARDT. Let me say, Mr. Chairman, I was directing my remarks to 2307. With reference to P.L. 85-804, I don't believe I can speak to that because it is a much more involved statute, and it goes to things far beyond what we are talking about this morning. And I would be prepared to discuss that in detail if you desired either with you, Mr. Chairman, or at another committee hearing but there would be, as you know this is the authority to the President directly, not to the Department of Defense, and it is regulated by a very extensive executive order to cover—

Senator BYRD. You mean 85-804?

Mr. BUZHARDT. Yes, sir, 85-804, it is a very large and complicated statute. I wouldn't, I am not prepared to address any problems that arise from 85-804 this morning because there is a—

Senator BYRD. Well, that is satisfactory because I am not sure that the—

Mr. BUZHARDT. It goes much beyond loans, Mr. Chairman.

Senator BYRD. I am not sure that the subcommittee is prepared to discuss in detail 85-804 either. What I wanted to do this morning, though, is to delineate just what statutes can be utilized for purposes of loans and advances to contractors and we have gotten it down pretty much now to two areas.

Mr. BUZHARDT. Yes, sir.

Senator BYRD. 2307, which possibly could be solved by the prior approval reprogramming procedure, that is a possibility. I have no interest in introducing legislation if we can accomplish it in another way.

Then the other is 85-804 which you say is a much broader provision.

Mr. BUZHARDT. It deals with many things, Mr. Chairman, even with the authority to guarantee indemnity to foreign governments to whom contractors, it is a very broad and detailed Act.

Senator BYRD. So long as that is identified as—until this hearing today, I doubt if it was too clear as to just how many different sections the Defense Department could operate under.

Mr. BUZHARDT. Well, even though I am not prepared to discuss all the ramifications of P.L. 85-804, Mr. Chairman, I felt in fairness we should mention it as something that as affected so you would be aware of it.

Senator BYRD. Yes, that is right.

Mr. BUZHARDT. It was not used, not involved in this case at all but it is an Act on the books.

Senator BYRD. I think by all means you should have mentioned it and if you hadn't I don't think you would have given the committee the information that it should have, which I, as I say, I think one objective of this hearing this morning is to delineate the problem facing the Congress and the Defense Department as to just how many of these statutes in this very complex code that we have got can be utilized and we have delineated that as I said.

Senator BYRD. You voluntarily brought out

85-804, we have been discussing at some length 2307, we know the Defense Production Act has been covered, and that leaves the matter of salvage operation which on cursory glance appears to me to be sort of a special situation.

Mr. BUZHARDT. It is, it is a very specialized situation.

Senator BYRD. Which should not give very great concern. Except for those four sections, plus minor ones like paying for newspaper subscriptions and that sort of thing in advance, that takes care, as I understand it from you, that takes care of all of the authority that the Defense Department has in the handling of tax funds with regard to loans, advances, et cetera, to contractors and private individuals.

Mr. BUZHARDT. That is correct, Mr. Chairman. Let me say, with respect to your bill there, as you know we have run into the same type of problem on reprogramming and that is why that is not a codified procedure. Our hesitancy here is not in an unwillingness to come over and justify whatever loans are made here, I have no problem with that whatsoever, and I am sure from the record I know of the advance payments we have, I would anticipate no problem. So we have no problem of justifying and I think we could justify them under that procedure very well.

Senator BYRD. I recognize that this bill I put in last week is broad in its implications and I put it in for the purpose of a discussion such as we have had here, and a hearing. I don't want to do anything that is unreasonable. If you are going to operate in the Defense Department you are going to have reasonable leeway. It is possible it is too broad.

Mr. BUZHARDT. Mr. Chairman, let me mention one other possibility of something that was mentioned to me, it is not really a loan but in certain situations, for instance, where we are dealing with a contractor that winds up in litigation so I will be sure to cover every possibility, there is a possibility that where a contractor owed us money that we could defer its payment under the outcome of the litigation or something of that nature, which could conceivably be considered a loan.

Now the reason that that arises is that, as you know, we have some rather extraordinary provisions that the normal contract does not have. When we buy something, for instance, a contractor just can't stop work, we have some very unusual and drastic remedies for collection of what is owed to us. In many cases, therefore, it is not practical to exercise those prior authorities, and in some cases where litigation is going to be the method by which the dispute is resolved rather than resorting to these unusual remedies we do permit deferral of the repayment until the end of the litigation. That to an extent could be considered a loan, I had not thought of it but Mr. Chermak remembered it, but again it is a very unusual sort of situation. It is a possibility.

Senator BYRD. Well, it might not be impractical to inform the Congress through it, again through the reprogramming process that that is what the Department feels should be done.

Mr. BUZHARDT. It would not, although I am very frank to say there are some problems where we have litigation in process, with going to the Congress with this type of information where we are involved in litigation, it is a matter that has to be dealt with on a very confidential basis, the litigating position of the government and as to how we handle it. It might present more difficulties although I don't think—

Senator BYRD. It might be something that your staff and the staff of the Armed Services Committee might explore.

Mr. BUZHARDT. All right, sir. We will be glad to do that. I think it is important because it could be considered on some kind of basis.

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## CONGRESSIONAL RECORD — SENATE

S 17223

Senator BYRD. That is right. I want to get on the record today everything, or every section of the code, that can be utilized for the purposes we have been discussing this morning.

Mr. BUZHARDT. Right.

Senator BYRD. I think that is very important to get that down in one place and then we can see which of these need to be tackled and which do not. As it stands now, I think we can either by legislation or by, hopefully by, agreement as to, on a strong prior approval reprogramming basis, work out some thing with regard to 2307.

Mr. BUZHARDT. Yes, sir.

Senator BYRD. If there is no further business, the committee will stand in adjournment, and I thank you, Mr. Buzhardt and your associates for being here this morning.

Mr. BUZHARDT. Thank you, Mr. Chairman.

Senator HUGHES. I would like to just address you as the Chairman.

Mr. Chairman, I did not receive a notice of the committee hearing until ten minutes to six on Friday evening after I had left town, and it was not possible for me to alter my schedule due to the fact that I had two appointments with Iowans who traveled from Iowa to see me this morning at ten o'clock, to be here sooner than I arrived.

Since I arrived just as the hearing was closing, I will have to read the record of the hearing and if there are questions to be asked in the future I am sure that you would allow me to direct those questions in writing to be answered in writing.

Senator BYRD. By all means. The Chairman regrets the problem faced by the Senator from Iowa today, the fact that he did not get notified as quickly as he should have received it. If the Senator from Iowa has questions that he would like to submit in writing the record will be held open for that purpose.

Further, if the Senator from Iowa, after going over the record, would like to have an additional meeting with the same witness or more witnesses or other witnesses, the Chairman of the Subcommittee will call such a hearing at the convenience of the Senator from Iowa.

Senator HUGHES. Thank you very much, Mr. Chairman.

(Whereupon, at 11:20 a.m., the hearing was concluded, subject to call of the Chair.)

Mr. PROXMIRE. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. Is all time yielded back?

Mr. SYMINGTON. I yield back my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment. The amendment was agreed to.

Mr. PROXMIRE. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SYMINGTON. Mr. President, I move to lay that motion on the table. The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

TIME LIMITATION OF HEARING ON H.R. 9639, SCHOOL LUNCH BILL

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that at

such time as an amendment by Mr. McGovern, referred to as the economic conversion amendment, to the military procurement bill is called up and made the pending question, there be a time limitation thereon of 2 hours, to be equally divided and controlled in accordance with the usual form.

The PRESIDING OFFICER. Does the Senator wish to make a proposal as to second-degree amendments?

Mr. ROBERT C. BYRD. Yes. I thank the Chair.

I ask unanimous consent that time on any second-degree amendment thereto be limited to 30 minutes, to be equally divided in accordance with the usual form.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### LIMITATION OF TIME ON H.R. 9639, SCHOOL LUNCH BILL

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that at such time as H.R. 9639, the school lunch bill, is called up before the Senate and made the pending business, there be a time limitation thereon of 2 hours; that there be a limitation on any amendment thereto of 30 minutes; that there be a time limitation of 20 minutes on any amendment to amendments, debatable motions, or appeals; and that the agreement be in the usual form.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, there will be no more votes today.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### AUTHORIZATION TO MAKE NECESSARY CLERICAL AND TECHNICAL CORRECTIONS IN ENGROSSMENT OF S. 2410

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. CRANSTON, I ask unanimous consent that the Secretary of the Senate be authorized to make necessary clerical and technical corrections in the engrossment of S. 2410.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ORDER TO MODIFY AND PRINT HARTKE AMENDMENT NO. 494

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the distinguished Senator from Indiana (Mr. HARTKE) may be authorized to modify his amendment No. 494, and that amend-

The PRESIDING OFFICER. Without objection, it is so ordered.

#### TOM VAIL

Mr. HARRY F. BYRD, JR. Mr. President, Thomas L. C. Vail, for many years chief counsel and chief of staff of the Senate Committee on Finance, was buried in Arlington Cemetery this afternoon. Tom Vail died Tuesday, at the age of 45, after a lingering illness.

Tom Vail was, in my judgment, one of the finest and ablest and one of the most dedicated public servants that our country has had. He served the Congress of the United States in various capacities for 22 years. He was a man of the highest integrity and character and ability.

Tom Vail became chief counsel and chief of staff of the Finance Committee in 1965. At that time the chairman of the Finance Committee was my immediate predecessor as Senator from Virginia. I happened to be in my father's office, he being my predecessor, on the day that Tom Vail came to his office, and the day that Senator Byrd, Sr., designated Tom Vail to be chief counsel and chief of staff of the Committee on Finance.

I did not know Mr. Vail prior to that time. I got to know him well a few months later when I myself came to the Senate, and even better after I became a member of the Senate Committee on Finance.

Incidentally, Tom Vail succeeded as chief counsel and chief of staff, Mrs. Elizabeth Springer, who recommended Tom Vail to Senator Byrd, Sr., for appointment to that position. I want to point out that Mrs. Springer was, and I think up to this time has been, the only woman to serve as chief counsel and chief of staff of a major Senate committee.

The Senate Finance Committee will miss Tom Vail. He had a capacity for objectivity, for presenting clearly and concisely and objectively the very complicated pieces of legislation which came before that important Senate committee.

Over and above that, under the leadership of the present chairman of the Finance Committee, Senator Long of Louisiana, Senator Long and Mr. Vail developed an outstanding professional staff. Senator Long gives Tom Vail credit for the development of the staff, and I think the Finance Committee today, as a result of the leadership of Tom Vail, has an unusually fine professional staff, who themselves have followed the example set by Tom Vail in ability, competence, objectivity, and dedication to the work of the committee, the work of the Senate, and the work of our Government.

It is a tragic day that a man as young as Tom Vail, with as much promise, has been taken from us.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.